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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GUMARO PASTILLAS VALDEZ, Defendant and Appellant.	B206636 (Los Angeles County Super. Ct. No. VA103376)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Modified and remanded in part; affirmed in part.

Jeffrey Lewis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Gumaro Valdez was convicted, following a jury trial, of one count of driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a) and one count of driving while having a 0.08 percent blood alcohol content in violation of section 23152, subdivision (b). Appellant admitted that he had suffered three prior convictions for violating section 23152, subdivision (b). The court sentenced appellant to a total term of two years in state prison. The court imposed various fines and fees and ordered appellant to pay attorney's fees in the amount of $8,265.18.

Appellant appeals from the judgment of conviction, contending there is insufficient evidence to support his conviction and further contending the trial court erred in instructing the jury on his oral admissions and imposing attorney's fees. We strike the order requiring appellant to pay attorney's fees and remand this matter for a hearing on appellant's ability to pay attorney's fees. We affirm the judgment of conviction in all other respects.

Facts

On November 23, 2007, about 10:00 p.m., California Highway Patrol ("CHP") Officers Gersain Chavez and Darren Evans responded to a call about a man in traffic lanes on the 5 Freeway attempting to wave down vehicles. When the officers reached the location, they saw appellant leaning against the back of a pick-up truck which was parked on the shoulder of the highway. The officers approached appellant and noticed a strong odor of alcohol on his breath. He appeared disoriented and was unsteady on his feet. His eyes were red and watery. No one else was in the area.

Appellant told both officers that he had been driving. He also stated that he was alone. Appellant was adamant that he had not had any alcohol to drink that night. Appellant also told the officers that his battery was dead. Appellant did not mention that he had been driving with a friend or that he was waiting for a friend to come back with help.

Officer Chavez observed that the truck was a single cab with no rear seat. The passenger side of the seat had a bag and papers on it. The passenger side of the floor had trash and papers, including an empty Bacardi bottle. Officer Chavez did not believe that there was room for a passenger. After making room for appellant to sit in the passenger seat, Officer Chavez got into the driver's seat and placed the engine in neutral. Officer Evans used his patrol car to push the truck down the nearest freeway exit ramp to a safer location.

In the new location, Officer Evans administered a field sobriety test to appellant. Appellant failed these tests. Officer Evans administered a breathalyzer test that showed that appellant had alcohol in his system. Appellant was arrested. The officers had spent about 50 minutes with appellant up to this point.

At the CHP station, a chemical test was performed on appellant. The test showed a blood alcohol level above 0.08 percent.

At trial, appellant offered the testimony of his childhood friend Pedro Hernandez, that Hernandez had been driving appellant's truck on the night of November 23 when it broke down. Hernandez testified that he went for help, but found none. When he returned about half an hour later, appellant and the truck were gone. Hernandez called his son, who came, picked him up and took him home.

In appellant's defense, his attorney argued that appellant spoke only Spanish, that neither CHP officer was certified in Spanish and that the officers had misunderstood appellant's statements about driving.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is no evidence that he drove while under the influence. We see sufficient evidence.

In reviewing a challenge to the sufficiency of evidence, "the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the

judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 432.) The standard of review is the same when the prosecution relies mainly on circumstantial evidence. (*People* v. *Rodriguez* (1999) 20 Cal.4th 1, 11.)

Both CHP officers testified that appellant admitted that he had been driving the vehicle. Officer Evans testified that appellant made this statement to him twice. In addition, there was extremely strong circumstantial evidence that appellant was the driver of the vehicle. CHP officers found appellant at his truck, on the side of the highway. There was no one else around. Appellant did not mention that anyone else had been with him in the truck in any capacity. The truck did not have a back seat. There was a bag and papers on the passenger seat of the car, and trash on the floor on the passenger side. In Officer Chavez's opinion, there was no room for a passenger. This evidence supports a reasonable inference that appellant drove the vehicle to its stopping place on the highway.

The CHP officers were alerted to the presence of the vehicle by 911 calls about a man standing in traffic lanes trying to wave down traffic. This is not the action of a sober man. It is reasonable to infer that appellant began seeking help immediately after his truck broke down. Thus, it is reasonable to infer that appellant was drunk when the truck broke down. Further, appellant insisted to the CHP officers that he had not had any alcohol to drink. This statement was clearly false. "Deliberately false statements to the police about matters that are within an arrestee's knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of a consciousness of guilt . . . ." (*People* v. *Williams* (2000) 79 Cal.App.4th 1157, 1167-1168.) Thus, appellant's false denial of drinking supports the inference that he drove the vehicle while under the influence.

Appellant points out that the truck was neatly parked and there was no evidence that the engine was warm or that the car had recently been driven, or that someone with impaired abilities had driven the car. He implies that he might have become drunk after parking the car by the side of the highway.

This was not appellant's defense at trial, and he offered no evidence to suggest that he began drinking after the truck became disabled and was parked. Indeed, his attorney stated in opening arguments that appellant began drinking at his house before getting into the truck. Appellant's own witness, Pedro Hernandez, stated that appellant had been drinking when Hernandez arrived at appellant's house. It would have been speculation for the jury to believe that appellant began drinking after his truck broke down. Such speculation enters the realm of fantasy when one considers that the law presumes that a person is intoxicated for three hours prior to a positive test. (Veh. Code, § 23153, subd. (b).) Thus, appellant would have had to experience his car breaking down more than two hours before the officers came, then sit by the side of the road drinking for a couple of hours, then decide to walk out into traffic and try to wave down assistance from passing vehicles.

Even assuming for the sake of argument that it would have been reasonable for the jury to infer that appellant began drinking after his vehicle broke down, it was also reasonable for the jury to infer that appellant had been driving while under the influence. "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*People* v. *Stanley* (1995) 10 Cal.4th 764, 792-793 [internal quotation marks and citations omitted].)

2. CALCRIM No. 358

Appellant contends that the trial court erred in giving CALCRIM No. 358, which he asserts contains an incorrect statement of the law and was prejudicial.

CALCRIM No. 358 provides: "You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether or not the

defendant made any such statement, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such a statement. [¶] *You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.*" (Italics added.) Appellant contends that the italicized portion of the instruction told the jury that it need not consider appellant's statements to Officer Evans with caution because the officer wrote down the statements in his police report.

Respondent contends that appellant has forfeited this claim of error by failing to object in the trial court. We agree. If appellant believed that the instruction was ambiguous or misleading, it was his responsibility to request a modification or clarification. (See *People* v. *Coffman* (2004) 34 Cal.4th 1, 122.)[1]

Assuming for the sake of argument that the claim were not forfeited, we would see no reasonable likelihood that the jury understood the instruction in the manner appellant claims.[2] The only reasonable understanding of the qualifying phrase "unless it was written or otherwise recorded" is that the oral statement need not be viewed with caution if it was affirmed in writing by the defendant or unless the jury could actually hear the defendant make the statement on audio or video tape.

CALCRIM No. 358 tells the jury that it must determine whether the defendant in fact made the pretrial oral statements. Thus, the instruction acknowledges that there is a dispute about whether the statement was even made. The instruction then tells the jury to view evidence of a defendant's oral statement with caution, that is the instruction warns

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[1] We do not agree with appellant that the instruction is an incorrect statement of the law, and so his claim was preserved without objection.

[2] "A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People* v. *Cross* (2008) 45 Cal.4th 58, 67-68.)

the jury that such a statement is susceptible to fabrication. In this case, the dispute was about Officer Evans's account of appellant's statements to him. It would make no sense to understand the instruction as, in effect, telling the jury to view Officer Evans's testimony about appellant's oral statements with caution because Officer Evans might have fabricated the statement, unless Officer Evans wrote it down. Such written statements by the officer would be just as susceptible to fabrication.

Further, Officer Evans's written police report was not admitted into evidence. Thus, it was not evidence of appellant's statement and was not seen by the jury. We do not believe that there is a reasonable likelihood that the jury would have understood the instruction to mean that appellant's statements were "written or otherwise recorded" because Officer Evans documented the statements in an inadmissible police report and that the existence of this unseen report meant that the jury should not view the oral statement with caution.

3. Attorney's fees

Appellant contends, and respondent agrees, that the trial court erred in imposing $8,265.18 in attorney's fees without complying with the statutory requirements. We agree as well, and remand the matter for a hearing on appellant's ability to pay.

"[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing." (*People* v. *Poindexter* (1980) 210 Cal.App.3d 803, 809, citing *People* v. *Amor* (1974) 12 Cal.3d 20, 29-30.)

The Penal Code requires the trial court to give notice to the defendant that it may, after a hearing, make a determination of the defendant's present ability to pay all or a portion of the cost of counsel. (Pen. Code, § 987.8, subd. (g)(2)(B).) Unless the trial court makes a finding of unusual circumstances, it is presumed that a defendant sentenced to state prison does not have the financial ability to pay for the cost of his defense. (Pen. Code, § 987.8, subd. (g)(2)(B).)

Here, there is nothing in the record to show that appellant was given notice and a hearing on his ability to pay. We do not see a finding by the trial court of unusual circumstances. The probation report is silent on appellant's financial situation.

The proper remedy in such a situation is to remand the matter to the trial court for notice and a hearing on appellant's ability to pay. (*People* v. *Flores* (2003) 30 Cal.4th 1059, 1068-1069.)

Disposition

The trial court's order that appellant pay attorney's fees is stricken. This matter is remanded for notice and a hearing on appellant's ability to pay attorney's fees. The judgment of conviction is affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.